No. 18-15

In the Supreme Court of the United States

JAMES L. KISOR, PETITIONER

v.

ROBERT L. WILKIE, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

A claimant for veterans' benefits may "reopen" a claim finally adjudicated by the Department of Veterans Affairs (VA) by presenting "new and material evidence." 38 C.F.R. 3.156(a). If the VA renders a decision favorable to the veteran, the effective date of its grant of benefits generally is the later of the date the VA received the motion to reopen or the date entitlement arose. 38 C.F.R. 3.400(q)(2). The VA will "reconsider" an earlier decision if it receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. 3.156(c). If the VA enters an award "based all or in part on [such] records," the effective date of the new decision is generally the later of the date entitlement arose or the date the VA received the previously decided claim. 38 C.F.R. 3.156(c)(3).

In 1983, the VA denied petitioner's 1982 claim for benefits, finding that he had not shown a diagnosis of his claimed disability. In 2006, petitioner moved to reopen that decision with new and material evidence and was awarded benefits prospectively. The Board of Veterans' Appeals declined to "reconsider" the claim and award benefits retroactive to 1982, however, concluding that the service records petitioner submitted were not "relevant" under Section 3.156(c) because they did not address petitioner's lack of diagnosis of disability in 1983. The questions presented are as follows:

1. Whether the records that petitioner submitted were "relevant" under 38 C.F.R. 3.156(c)(1) so that petitioner's benefits award should have been given a 1982 effective date.

2. Whether the Court should overrule *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997).

3. Whether a substantive canon of construction displaces judicial deference under *Seminole Rock* and *Auer*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 869 F.3d 1360. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 20a-25a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 7, 2017. A petition for rehearing was denied on January 31, 2018 (Pet. App. 44a-46a). On April 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including June 29, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] Robert L. Wilkie, Secretary of Veterans Affairs, is automatically substituted for his predecessor, former Acting Secretary of Veterans Affairs Peter O'Rourke. See Sup. Ct. R. 35.3.

STATEMENT

1. Congress has established a framework for providing disabled veterans with monetary benefits. The Department of Veterans Affairs (VA) administers the veterans-benefits program. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011); see 38 U.S.C. 301(b). The Secretary of Veterans Affairs is authorized to adopt regulations implementing federal benefits laws, including regulations regarding the procedure for adjudicating claims and the "nature and extent of proof and evidence" required "to establish the right to benefits." 38 U.S.C. 501(a)(1).

a. A veteran generally is entitled to monthly monetary benefits if he or she is disabled because of injury or disease incurred "in [the] line of duty" during military service. 38 U.S.C. 1110, 1131; see 38 U.S.C. 1114, 1134. These payments generally run from an effective date tied to the later of the VA's receipt of the veteran's claim for benefits or the date the entitlement arose, but various exceptions exist that establish different effective dates. See 38 U.S.C. 5110.

To demonstrate entitlement to benefits, a veteran must show (1) a present disability; (2) a disease or injury that occurred or was aggravated in-service; and (3) a causal connection between the disability and the in-service disease or injury. See *Shedden* v. *Principi*, 381 F.3d 1163, 1166-1167 (Fed. Cir. 2004). To obtain benefits for post-traumatic stress disorder (PTSD), a veteran must show (1) "medical evidence diagnosing the condition"; (2) an "in-service stressor," such as experience in combat; and (3) "a link, established by medical evidence, between current symptoms and [the] in-service stressor." 38 C.F.R. 3.304(f).

b. The VA is charged with adjudicating claims for benefits, including resolving "all questions of law and fact necessary to a decision" whether benefits will be awarded. 38 U.S.C. 511(a). Through its regional offices and claims adjudicators, the Veterans Benefits Administration within the VA develops the record in individual cases and decides claims through a multi-step process. See 38 U.S.C. 5100 *et seq.* Claims for benefits are received and processed by a VA regional office, which renders an initial decision. See *Henderson*, 562 U.S. at 431. A veteran who is dissatisfied with the regional office's decision may seek de novo review by the Board of Veterans' Appeals (Board), a component of the VA. See *ibid.*; see also 38 U.S.C. 301(c)(5), 7101 *et seq.*

A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252, 7266. Decisions of the Veterans Court may in turn be appealed to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(b)(1). In reviewing the Veterans Court's decisions, the Federal Circuit has jurisdiction to "decide all relevant questions of law, including interpreting constitutional and statutory provisions," and to "hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims" that the Federal Circuit concludes is unlawful. 38 U.S.C. 7292(d)(1).

c. Under VA regulations, final decisions on claims for benefits may be revisited in certain circumstances. See 38 C.F.R. 3.156. Those regulations distinguish between circumstances in which the VA will "reopen,"

and those in which it will "reconsider," a claim that the agency has previously decided. *Ibid.*

Under Section 3.156(a), a claimant may "reopen a finally adjudicated claim by submitting new and material evidence." 38 C.F.R. 3.156(a). That provision defines "new evidence" as "existing evidence not previously submitted to agency decisionmakers." *Ibid.* Evidence is "material" if, "by itself or when considered with previous evidence of record, [it] relates to an unestablished fact necessary to substantiate the claim." *Ibid.* Section 3.156(a) further provides that "[n]ew and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." *Ibid.* If a previously decided claim is reopened based on such new and material evidence and the VA grants an award, the effective date of the award is the "[d]ate of receipt of [the] new claim or [the] date entitlement arose, whichever is later." 38 C.F.R. 3.400(q)(2).

In more limited circumstances, the VA's regulations authorize the agency to "reconsider" a previously decided claim, based on service department records that existed at the time of the earlier decision but were overlooked at that time. 38 C.F.R. 3.156(c)(1). The VA will reconsider a claim if it receives any "relevant official service department records that existed" when the agency decided a claim, but which "had not been associated with the claims file." *Ibid.* Such records include "[s]ervice records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name." 38 C.F.R. 3.156(c)(1)(i). If the VA reconsiders a claim and renders an award "based all or in part on" such records, the effective date of the new

award is generally "the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. 3.156(c)(3).

2. a. Petitioner served in the Marine Corps from 1962 to 1966 and fought in the Vietnam War. Pet. App. 2a, 4a. In 1982, he filed a claim for disability benefits, stating that he suffered from PTSD. *Id.* at 2a; C.A. App. 14. Petitioner's psychiatric evaluation stated that he had served in combat in Operation Harvest Moon, where his company had come under attack from snipers and mortars, including "one major ambush which resulted in 13 deaths." Pet. App. 3a (citation omitted). The evaluating psychiatrist diagnosed petitioner with "a personality disorder as opposed to PTSD." *Ibid.* (citation omitted).

In 1983, the VA regional office denied petitioner's claim, concluding based on its review of the evidence that petitioner's claim of PTSD was "not shown by evidence of record." C.A. App. 23 (capitalization altered); see 38 C.F.R. 4.127 ("[P]ersonality disorders are not diseases or injuries for compensation purposes."). Petitioner filed a notice of disagreement with this denial, but he failed to perfect the appeal, and the denial became final. Pet. App. 3a.

b. i. In 2006, petitioner moved to reopen his claim. Pet. App. 4a. While the motion was pending, petitioner submitted a 2007 psychiatric evaluation that had diagnosed him with PTSD. *Ibid.* Petitioner was evaluated by a VA examiner, who also diagnosed him with PTSD. *Ibid.* Petitioner submitted Department of Defense records regarding his military service, medals, and combat history, including his participation in Operation Harvest Moon. *Ibid.*

The VA regional office reviewed petitioner's submissions, along with the evidence submitted with his origi-

nal claim, and granted his claim for benefits at a 50 percent disability rating effective June 5, 2006, the date the agency had received petitioner's reopened claim. Pet. App. 4a & n.3 (citing 38 C.F.R. 3.156(a)); C.A. App. 32-34. After petitioner noted his disagreement with both the disability rating and the effective date, the VA's regional office increased his schedular disability rating to 70% and granted petitioner a 100% rating on an extraschedular basis, but it did not change the effective date. Pet. App. 5a-6a.

ii. Petitioner appealed to the Board, which held that he was not entitled to an earlier effective date. Pet. App. 27a (citing 38 C.F.R. 3.156, 3.400). The Board observed that petitioner's original claim had been denied in 1983 "because he did not have a diagnosis of PTSD" at that time. *Id.* at 30a. It explained that, because petitioner's PTSD diagnosis had been submitted for the first time in proceedings on his June 5, 2006, motion to reopen his claim, that was the "earliest effective date" for his award of benefits. *Id.* at 33a. In challenging the validity and finality of the 1983 denial, petitioner argued that a page of his service records had been destroyed or was never obtained, that the VA's medical examination was inappropriate, that other records were not obtained, and that petitioner's mental state had prevented him from acting before 2006. *Id.* at 33a-34a. The Board rejected these arguments. *Id.* at 34a-39a.

The Board then identified "another way" that petitioner might have challenged the 1983 denial of his claim. Pet. App. 39a. It noted that petitioner might have sought reconsideration of his original claim under 38 C.F.R. 3.156(c)(1), based on relevant service department records—service records and a battalion daily log evidencing petitioner's combat experience in Operation

Harvest Moon—that had existed in 1983 but were not considered at that time. Pet. App. 39a-41a. The Board concluded that this potential argument would have failed because Section 3.156(c)(1) "is not applicable" in the circumstances presented here. *Id.* at 40a.

The Board explained that "[s]ervice connection can be granted only if there is a current disability," and that petitioner's claim had been denied in 1983 "because there was no diagnosis of PTSD," not based on any doubt that petitioner had "suffered a traumatic event during service." Pet. App. 42a. The Board explained that, in order to be "relevant" in this context, service records therefore would need to have addressed petitioner's lack of a PTSD diagnosis in 1983, by at least "suggest[ing] or better yet establish[ing] that [petitioner] ha[d] PTSD as a current disability." *Ibid.* The service records that petitioner later submitted showing his combat experience did not fill that gap, but rather "skip[ped] this antecedent" issue "to address the next service connection requirement of a traumatic event during service." *Ibid.* Because the service records did not cast doubt on the correctness of the 1983 decision, the Board concluded that the records were not "relevant official service department records" under 38 C.F.R. 3.156(c)(1) and thus would not have provided a basis for reconsidering the 1983 decision. Pet. App. 43a.

3. The Veterans Court affirmed. Pet. App. 20a-25a. The court explained that it had "review[ed] the Board's determination of the proper effective date under the 'clearly erroneous' standard of review," and that petitioner "'b[ore] the burden of persuasion on appeal[].'" *Id.* at 25a (quoting *Evans* v. *West*, 12 Vet. App. 396, 401 (1999), and *Hilkert* v. *West*, 12 Vet. App. 145, 151 (1999) (en banc)). The court rejected petitioner's contention

that the Board had "failed to consider and apply the provisions of 38 C.F.R. 3.156(c)." *Id.* at 22a.

Petitioner contended that "the VA's receipt of relevant service records, which had not been previously considered by the VA, required the VA to reconsider his initial claim." Pet. App. 23a (brackets and citation omitted). In rejecting that argument, the Veterans Court explained that the Board had found the newly submitted service department records not to be relevant under Section 3.156(c)(1) because those records did not address whether petitioner had a diagnosis of PTSD in 1983. *Id.* at 23a-24a. The court observed that petitioner "d[id] not assert that the service department records contain a diagnosis of PTSD." *Id.* at 24a. The court "[wa]s not persuaded that the Board incorrectly applied § 3.156(c)," and it concluded "that [petitioner] ha[d] failed to demonstrate error in the Board's findings that an effective date earlier than June 5, 2006, is not warranted for the grant of service connection for PTSD." *Id.* at 25a.

4. The court of appeals affirmed. Pet. App. 1a-19a. Petitioner contended "that the VA should have reconsidered his claim under" 38 C.F.R. 3.156(c)(1) "and thus afforded him the favorable effective date treatment that the regulation provides," and "that the Veterans Court, like the Board, mistakenly interpreted the term 'relevant' as used in" that regulation. Pet. App. 12a (citation and internal quotation marks omitted). The court of appeals rejected that contention. See *id.* at 14a-19a.

The court of appeals "h[e]ld that the Veterans Court did not misinterpret § 3.156(c)(1)." Pet App. 14a. The court of appeals found the term "relevant" in Section 3.156(c)(1) to be ambiguous. *Id.* at 15a; see *id.* at 15a-17a. The court observed that in some contexts "relevant" can mean "any tendency to make a fact more or

less probable," while in other contexts it means "logically connected and tending to prove or disprove a matter *in issue*." *Id.* at 16a (brackets and citations omitted). The court stated that it would defer to the Board's interpretation, under which "'relevant' means non-cumulative and pertinent to the matter at issue in the case," because that construction was not "'plainly erroneous or inconsistent' with the VA's regulatory framework." *Id.* at 17a (quoting *Long Island Care at Home, Ltd.* v. *Coke*, 551 U.S. 158, 171 (2007)).

The court of appeals further explained that "the records [petitioner] submitted" in 2006 "were superfluous to the information already existing in his file" and were "not probative here because they d[id] not purport to remedy the defects of his 1982 PTSD claim." Pet. App. 17a-18a. The court observed that petitioner's claim had been denied in 1983 "because the requisite diagnosis of PTSD was lacking," and petitioner "d[id] not urge that the 2006 records provide that diagnosis." *Id.* at 18a. The court accordingly "s[aw] no plain error in the Board's conclusion that the records were not 'relevant' for purposes of § 3.156(c)(1)." *Ibid.*

5. Petitioner sought rehearing en banc, which the court of appeals denied. Pet. App. 44a-46a. Judge O'Malley, joined by Judges Newman and Moore, dissented from the denial of rehearing. *Id.* at 47a-54a. In their view, any ambiguity in Section 3.156(c)(1) should have been resolved in petitioner's favor by applying the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 50a (citation omitted).

ARGUMENT

The court of appeals correctly held that petitioner was not entitled to have his 1982 benefits claim "reconsider[ed]" under 38 C.F.R. 3.156(c)(1) because the records he had submitted concerned only facts that were not in dispute and did not address the dispositive issue of whether petitioner had a PTSD diagnosis in 1983 when the VA denied his claim. That holding does not conflict with any decision of this Court or another court of appeals.

Petitioner argues (Pet. 10-22) that this Court should grant review to overrule its decisions in *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), and *Auer* v. *Robbins*, 519 U.S. 452 (1997), which hold that courts generally should afford deference to an agency's interpretation of its own regulation. Although the question is an important one that may warrant this Court's review in an appropriate case, see, *e.g.*, *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari); *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in part and concurring in the judgment), this case would be an unsuitable vehicle in which to reconsider *Seminole Rock* or *Auer*.

Most importantly, because the Board's interpretation of Section 3.156(c)(1) reflects by far the best understanding of the regulation's plain text and purpose, the proper disposition of this case does not turn on whether that interpretation is entitled to deference. The Board correctly determined that a service department record is not "relevant" within the meaning of Section 3.156(c)(1) if it relates only to facts that are undisputed and that do not address a fatal omission in a veteran's prior claim for benefits. Although the court below upheld that ruling under

the deference principles articulated in *Auer* and *Seminole Rock*, were this Court to grant review, the proper disposition would be to affirm regardless of whether *Auer* and *Seminole Rock* were correctly decided. The question whether *Seminole Rock* and *Auer* should be overruled, therefore, has no practical significance in this case.

Petitioner further contends (Pet. 23-28) that the Court should grant review to determine whether, in the specific context of claims for veterans' benefits, other canons of interpretation displace the deference that would otherwise apply under *Seminole Rock* and *Auer*. Because the Board's interpretation reflects the best reading of the regulation's plain text and purpose, the relationship between rules of deference and other interpretive principles is not implicated in this case. In addition, the particular canon that petitioner invokes—that ambiguities in statutory provisions addressing veterans' benefits should be construed in favor of the veteran—is inapplicable because petitioner's reading of the regulation is not plausible in context, and the continuing vitality of that canon is in doubt. It is also uncertain whether that canon even applies to the interpretation of regulations. Petitioner did not advance this argument below, moreover, and the courts below accordingly did not address it. Petitioner has not identified any conflict among the courts of appeals on this question, and even if a conflict existed, this case would be a poor vehicle to address it. Further review is not warranted.

1. The Board correctly determined that, under the plain text of 38 C.F.R. 3.156(c) and its purpose, petitioner was not entitled to have the VA's 1983 denial of his 1982 claim reconsidered, see Pet. App. 39a-43a, and the Veterans Court and court of appeals correctly upheld that determination, see *id.* at 14a-19a, 22a-25a.

a. The VA's regulations allow a veteran whose claim for benefits has been finally adjudicated to "reopen" that claim based on "new and material evidence" supporting the veteran's claim for benefits. 38 C.F.R. 3.156(a). If a reopened claim is granted based on new and material evidence, the award's effective date generally is the later of the date the VA received the motion to reopen or the date entitlement arose. 38 C.F.R. 3.400(q)(2).

The VA's regulations establish a limited exception to that general effective-date rule. If the VA "receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when VA first decided [a] claim," the agency will "reconsider" the veteran's claim. 38 C.F.R. 3.156(c)(1). If the VA grants reconsideration and enters an award "based all or in part" on such records, the award's effective date is generally the later of the date the VA received the previously decided claim or the date entitlement arose. 38 C.F.R. 3.156(c)(3).

Section 3.156(c) reflects that, when the VA concludes that service records extant at the time of its previous decision were overlooked, and that considering them would produce a different result, the VA is in effect determining that its original decision was incorrect *ab initio*. Section 3.156(c) thus "serves to place a veteran in the position" in which "he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh* v. *McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). In contrast, when a veteran reopens a claim by submitting new and material evidence that does not consist of such service records, a favorable VA decision on the reopened claim does not imply that the agency's original

denial was inconsistent with the evidence that was available at the time.

b. The VA's regulations do not define the term "relevant service department records" in 38 C.F.R. 3.156(c)(1), and the Board in this case did not articulate a comprehensive definition of the term. Instead, the Board determined that the records petitioner had submitted in 2006, when he sought to reopen the VA's 1983 decision denying his claim for benefits, were not "relevant" in the circumstances of this case. Pet. App. 42a-43a; see *id.* at 19a (explaining that the court of appeals "underst[ood] the Board and Veterans Court as finding only that, on the facts and record of this case, [petitioner's] later-submitted materials were not relevant to determination of *his* claim"). The Board's determination reflects substantially the best reading of the regulation's plain text and purpose.

i. The Board explained that petitioner could not establish service connection and an entitlement to the benefits he had claimed in 1982 unless he showed that he had a "current disability" at that time. Pet. App. 42a. In 1983, the VA had denied petitioner's claim because evidence of his asserted disability was lacking. *Ibid.* The Board noted that "[t]he May 1983 rating decision denied service connection because there was no diagnosis of PTSD." *Ibid.* The lack of such a diagnosis was dispositive.

In 2006, petitioner sought reopening under Section 3.156(a), and he subsequently submitted additional evidence. One document petitioner submitted was a report from a psychiatrist who had examined petitioner in 2007 and had diagnosed him as suffering from PTSD since 1983. Pet. App. 4a; C.A. App. 100-111. The Board properly considered that 2007 diagnosis as new and material evidence under Section 3.156(a). Based on that

and other evidence, the VA awarded petitioner benefits from the date of his request for reopening. But because the 2007 diagnosis had not existed "when [the] VA first decided [petitioner's] claim" in 1983, and because it was not a service record, it could not trigger reconsideration under Section 3.156(c). 38 C.F.R. 3.156(c)(1). Petitioner does not challenge that determination here.

Petitioner also submitted a collection of service department records that detailed petitioner's service in Vietnam and his combat participation in Operation Harvest Moon. Pet. App. 4a. Those documents had existed in 1983 when the VA denied petitioner's initial benefits claim. *Ibid.* In the course of evaluating petitioner's reopening request, the Board *sua sponte* considered whether that evidence would instead warrant reconsideration of the prior benefits denial under Section 3.156(c), which would have resulted in an earlier effective date for benefits. See *id.* at 4a, 39a. The Board correctly concluded, however, that those records were not "relevant" within the plain meaning of Section 3.156(c). *Id.* at 42a-43a.

As the Board explained, "the basis of the denial" of petitioner's claim in 1983 "was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not [petitioner] engaged in combat with the enemy during service." Pet. App. 43a; see C.A. App. 23 ("VA psychiatric examiner has diagnosed intermittent explosive disorder and atypical personality disorder. * * * Post Traumatic Stress Neurosis, claimed by Vet; not shown by evidence of record." (capitalization altered)). The Board determined that the service records did not address the dispositive issue of whether petitioner had a diagnosis of PTSD in 1983, Pet. App. 42a, and petitioner has not disputed that determination. Petitioner did not argue in either the Veterans Court or the court

of appeals that the service records contained such a diagnosis. See *id.* at 18a, 24a. Thus, while the service records confirmed petitioner's combat service, they did not cast doubt on the 1983 decision's "finding that a diagnosis of PTSD was not warranted." *Id.* at 43a.

ii. The Board's commonsense understanding of the term "relevant" in this context is consistent with other uses of that term in the veterans-benefits scheme. For example, the VA is required to make reasonable efforts to obtain "relevant private records" identified in a veteran's claim. 38 U.S.C. 5103A(b)(1). For purposes of that requirement, a record is not "relevant" if it does not "have a reasonable possibility of helping to substantiate the veteran's claim." *Golz* v. *Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010). In assessing a disability's connection to service, the VA likewise must consider all "pertinent medical and lay evidence," 38 U.S.C. 1154(a)(1), which the Federal Circuit has understood to mean "relevant" evidence, *AZ* v. *Shinseki*, 731 F.3d 1303, 1311 (Fed. Cir. 2013). In order to be "relevant" for this purpose, the evidence must "tend to prove or disprove a material fact," and it is not "relevant" if it "does not tend to prove a fact that is of consequence to the action." *Ibid.* (citation omitted). The service records submitted in petitioner's 2006 claim tended to prove a fact (petitioner's combat experience) that had not been disputed and that, without evidence of a PTSD diagnosis, could not have demonstrated a current disability that could support a grant of benefits. Those records therefore did not tend to prove a "fact that is of consequence to the action." *Ibid.* (citation omitted).

The Board's understanding of Section 3.156(c)(1) is reinforced by paragraph (c)(3). That provision states that an "[a]n award" in a case the VA reconsiders is retroactive

to the later of the original date of entitlement or the date the VA received the previously decided claim only if the new award is "made *based all or in part on* the records identified by paragraph (c)(1)," *i.e.*, relevant service records that existed but were not associated with the claims file at the time of the original decision. 38 C.F.R. 3.156(c)(3) (emphasis added). Section 3.156(c) thus "only applies 'when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and *those records lead VA to award a benefit that was not granted in the previous decision.*'" *Blubaugh*, 773 F.3d at 1314 (citation omitted). When service department records are duplicative of evidence already submitted as part of the initial claim, any award of benefits generally would not be "based all or in part on" those service department records.[2]

c. Petitioner challenges (Pet. 21-22) the Board's conclusion that the service department records are not "relevant" within the meaning of Section 3.156(c)(1). His arguments lack merit.

i. Petitioner asserts that "material is 'relevant' for purposes of Section 3.156(c)(1) if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable,'" and that documents therefore "are 'relevant' if they matter to the VA's decision whether to grant benefits." Pet. 21 (brackets and citation omitted); see Pet. 22 (explaining that, under Federal Rule of Evidence 401, evidence is relevant if it has "'any tendency to make a fact more or less probable' when the 'fact is of consequence in

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[2] This interplay between paragraphs (c)(1) and (3) is not directly implicated in this case, because the VA stated that petitioner's combat service was "verified" based on the service department records. C.A. App. 30.

determining the action'" (quoting Fed. R. Evid. 401)). He further contends that the records here were "relevant" because they "speak to the presence of an in service stressor, one of the requirements of compensation for an alleged service-connected [injury]." Pet. 21 (citation omitted). As applied in this case, however, the Board's interpretation of "relevant" comports with petitioner's definitions, and his service records do not meet his own standard.

As explained above, the Board concluded that the newly discovered service records were not relevant because they did not address the issue—the lack of a PTSD diagnosis—that was dispositive in 1983. The prerequisite to disability benefits that the records did address—whether petitioner had experienced an in-service stressor—was undisputed and, in light of the absence of a PTSD diagnosis, did not affect the outcome. See pp. 13-15, *supra*; Pet. App. 42a-43a; see also *id.* at 18a (whether petitioner "was exposed to an in-service stressor * * * was never at issue in this case"). The Board thus effectively determined that the records did not address "any fact that is *of consequence* to the determination of the action," and that they did not "matter to the VA's decision whether to grant benefits." Pet. 21 (emphasis added; citation omitted).

ii. Petitioner also contends (Pet. 22) that the Board's reading of "relevant" in Section 3.156(c) improperly equates that term with "material" in subsection (a). Pet. 22. That argument lacks merit. Section 3.156(a) permits a veteran to "reopen" any finally adjudicated claim by submitting "new and material evidence." 38 C.F.R. 3.156(a). The regulation defines "[n]ew evidence" as "existing evidence not previously submitted to agency decisionmakers," and it defines "[m]aterial evidence" as "existing evidence that,

by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Ibid.* It further provides that "[n]ew and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." *Ibid.* As explained above, an award on a reopened claim generally is effective as of the later of the date the VA received the motion to reopen or the date entitlement arose. 38 C.F.R. 3.400(q)(2).

In certain limited circumstances, Section 3.156(c)'s procedure for the VA to "reconsider" a prior benefits denial enables a veteran to obtain a more favorable result: an award that is retroactive to the later of the date the original entitlement arose or the date the VA received the previously decided claim, rather than to the date of the request for reopening. In this case, the VA received petitioner's original benefits claim in 1982, and petitioner's request to reopen was filed in 2006. See p. 5, *supra*. Given the context and purpose of Section 3.156(c)'s reconsideration procedure, it would be illogical to interpret "relevant" in Section 3.156(c)(1) to set a *lower* threshold for obtaining retroactive decisions than Section 3.156(a) establishes for reopening claims and obtaining non-retroactive decisions.

Section 3.156(a) provides for a later effective date when a veteran's claim is initially denied but "subsequently granted based on new and material evidence," while Section 3.156(c) mandates an earlier effective date when "the veteran's claim was originally denied due to error or inattention on the part of the government," as where the VA fails to consider pertinent service department records that exist at the time of the original denial.

Sears v. *Principi*, 349 F.3d 1326, 1331 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004). Section 3.156(c) thus serves to "ensure[] that a veteran is not denied benefits due to an administrative error," by placing the veteran in "the position" in which "he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh*, 773 F.3d at 1313. It is entirely clear in this case that, even if the service department records at issue here had been considered in 1983, petitioner still would have been denied benefits at that time based on the lack of any diagnosis of PTSD. Petitioner thus seeks to be placed in a *better* position than he would have occupied if those service department records had been brought to the VA's attention from the outset. That result would be inconsistent with both the text and purpose of Section 3.156(c).

2. Petitioner principally contends (Pet. 10-22) that the Court should grant review to overrule its holdings in *Seminole Rock* and *Auer* that an agency's interpretation of its own regulation generally is entitled to deference. Although this Court has declined review to consider whether to overrule those decisions,[3] this is an important issue that may warrant this Court's review in an appropriate case, as illustrated by separate opinions

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[3] See, *e.g.*, *Garco*, *supra* (No. 17-225); *Noble Energy, Inc.* v. *Haugrud*, 137 S. Ct. 1327 (2017) (No. 16-368); *Hyosung D & P Co.* v. *United States*, 137 S. Ct. 1325 (2017) (No. 16-141); *Flytenow, Inc.* v. *FAA*, 137 S. Ct. 618 (2017) (No. 16-14); *Gloucester Cnty. Sch. Bd.* v. *G.G. ex rel. Grimm*, 137 S. Ct. 369 (2016) (No. 16-273) (granting review on other questions but not on whether to overrule *Auer*); *United Student Aid Funds, Inc.* v. *Bible*, 136 S. Ct. 1607 (2016) (No. 15-861); *Sweeker* v. *Midland Power Coop.*, 136 S. Ct. 990 (2016) (No. 15-748); *Brown* v. *Columbia Gas Transmission, LLC*, 135 S. Ct. 2051 (2015) (No. 14-913); *Stewart & Orchards* v. *Jewell*, 135 S. Ct. 948 (2015) (No. 14-377).

issued and joined by several Members of the Court.[4] This case, however, would be an unsuitable vehicle to consider whether to overrule *Seminole Rock* and *Auer*.

For the reasons discussed above, the Board's determination that Section 3.156(c) is inapplicable to the circumstances of this case reflects by far the best reading of the regulation's text and purpose. See pp. 13-19, *supra*. The outcome of this case therefore would be the same regardless of whether the Board's interpretation of the rule is entitled to judicial deference. Cf. *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 67 (2011) (Scalia, J., concurring) ("In this suit I have no need to rely on *Auer* deference, because I believe the FCC's interpretation is the fairest reading of the orders in question.").

Indeed, the Board's interpretation of Section 3.156(c) was not simply the *better* reading of the rule, but the *only* permissible construction. The court of appeals deemed Section 3.156(c) ambiguous principally because the parties tendered competing definitions of "relevant." Pet. App. 15a-17a. "Ambiguity," however, "is a creature not of definitional possibilities but of statutory context," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994), and "[a] provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that

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[4] See, *e.g.*, *Garco*, 138 S. Ct. at 1052-1053 (Thomas, J., joined by Gorsuch, J., dissenting from the denial of certiorari); *United Student Aid Funds*, 136 S. Ct. at 1608 (Thomas, J., dissenting from the denial of certiorari); *Mortgage Bankers*, 135 S. Ct. at 1210-1211 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1213-1225 (Thomas, J., concurring in the judgment); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., joined by Alito, J., concurring); see also *id.* at 616-626 (Scalia, J., concurring in part and dissenting in part).

makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law," *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) (citation omitted). No sensible reading of the term "relevant" in Section 3.156(c) could encompass records that do not address a dispositive issue and therefore cannot affect the outcome of the proceeding. That is particularly so because, even if the VA had considered the newly submitted service department records in 1983, the agency would not have awarded benefits at that time given the absence of any diagnosis of PTSD. Petitioner would not have been entitled to benefits unless and until he filled that evidentiary gap. Acceptance of petitioner's argument therefore would not serve Section 3.156(c)'s purpose of placing petitioner in the same position he would have occupied if the VA had considered all the information then in the government's possession when it first adjudicated petitioner's benefits claim. Rather, it would result in an *earlier* effective date for benefits than if the agency had actually considered the service department records when it first adjudicated petitioner's claim in 1983. See pp. 18-19, *supra*.

Even if the Court viewed the regulation as ambiguous, however, the Board's interpretation is clearly the better reading, leaving aside any form of deference. See pp. 13-19, *supra*. The application of deference under *Seminole Rock* and *Auer*, therefore, does not matter in this case. If a court reviewing the Board's interpretation were to find the regulation ambiguous, and the court did *not* apply deference, the court still should uphold the Board's interpretation—that petitioner was not entitled to reconsideration and a retroactive decision—because it reflects a far more natu-

ral reading of the regulation than petitioner's interpretation. If instead the court did apply deference under *Seminole Rock* and *Auer*, it would uphold the Board's interpretation on that basis. Either way, the result would be the same: the court would uphold the Board's interpretation. Accordingly, were this Court to grant review in this case, the proper disposition would be to affirm regardless of whether *Auer* and *Seminole Rock* were correctly decided, see, *e.g.*, *Dahda* v. *United States*, 138 S. Ct. 1491, 1498-1500 (2018) (affirming on alternative ground), which would avoid the need to address petitioner's broader arguments invoking "constitutional concerns," Pet. 16 (citation omitted); see, *e.g.*, *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988).[5]

This case also would be a poor vehicle for addressing petitioner's principal argument against deference under *Seminole Rock* and *Auer*. Petitioner's lead argument (Pet. 15-16) is that such deference improperly enables agencies to bypass statutorily prescribed procedures set forth in the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, that govern agencies' promulgation of notice-and-comment regulations, see 5 U.S.C. 553. Petitioner contends (Pet. 15) that "deference provides agencies an end-run around the notice-and-comment procedures required by the Administrative Procedure Act," and "allow[s] agencies to skirt this fundamental legal constraint." He

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[5] In addition, if the Court granted review on the second question petitioner presents, see pp. 24-25, *infra*, and agreed with petitioner's position that the pro-veteran canon of construction takes precedence over deference under *Seminole Rock* and *Auer*, there would be no reason to consider the applicability of deference in this case. That possibility provides a further reason why this case would be an unsuitable vehicle for considering whether to overrule *Seminole Rock* and *Auer*.

further argues that "*Auer* deference 'frustrates the notice and predictability purposes of rulemaking,'" Pet. 15 (quoting *Garco*, 138 S. Ct. at 1053 (Thomas, J., dissenting from the denial of certiorari), and "allows the agency to control the extent of its notice-and-comment-free domain" by "writ[ing] substantive rules more broadly and vaguely" and then "using interpretive rules unchecked by notice and comment" to give those rules content, Pet. 15-16 (quoting *Mortgage Bankers*, 135 S. Ct. at 1212 (Scalia, J., concurring in the judgment)); see *Talk America*, 564 U.S. at 68-69 (Scalia, J., concurring).

This case would be a poor vehicle for addressing that argument because the concern petitioner raises (Pet. 15-16) about circumventing notice-and-comment procedures is significantly reduced in this context. The VA (through the Board) was interpreting its own procedural rules, and it is well established that agencies may adopt and interpret such rules through adjudications without resorting to rulemaking. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293-294 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). That the VA instead promulgated a regulation, and subsequently clarified (*sua sponte*) here how that rule applied in the particular circumstances of petitioner's case, mitigates the concern petitioner raises and thus would make this case an unsuitable vehicle for addressing that argument.[6]

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[6] Petitioner's contention (Pet. 19) that deference is less appropriate in this case because "the VA is a *party*" is similarly incorrect. The Board acted as an agency adjudicator in the administrative phase of these proceedings. Its function was to determine on behalf of the VA the proper effective date of petitioner's benefits award, not to defend the agency's decision in subsequent court proceedings. The VA's authority to construe its procedural rules in cases before the agency therefore is at its apex here.

3. Petitioner alternatively contends (Pet. 23) that deference under *Seminole Rock* and *Auer* should be displaced by "a substantive canon of construction." See Pet. 23-28. That question does not warrant review at this time, and this case would be a poor vehicle to address it.

a. Petitioner did not argue before the VA, the Veterans Court, or the court of appeals panel that deference should be overcome by the canon to resolve ambiguities in favor of veterans. Consequently, none of those tribunals addressed the question. Petitioner raised the argument for the first time in his rehearing petition, C.A. Pet. for Reh'g 12-15, and it was discussed only by the judges who dissented from the denial of rehearing, Pet. App. 50a-51a (O'Malley, J., joined by Newman and Moore, JJ., dissenting from the denial of rehearing en banc). As "a court of final review and not first view," this Court ordinarily does not "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012) (citations omitted). The Court is particularly reluctant to address questions that were not timely pressed in the lower courts. See, *e.g.*, *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001); *Glover* v. *United States*, 531 U.S. 198, 205 (2001). And while petitioner contends (Pet. 23-27) that the circuits have reached inconsistent conclusions regarding the interplay between other interpretive canons and various forms of judicial deference to agency decisions, he does not identify any court of appeals' decision holding that the pro-veteran canon overrides principles of deference under *Seminole Rock* and *Auer*.

b. As explained above, the applicability of deference has no practical significance in this case because the Board's reading reflects by far the best interpretation

of the pertinent rule. See pp. 19-22, *supra*. In applying the pro-veteran canon to the interpretation of ambiguous statutory provisions, this Court has cautioned that the canon cannot be used to "distort the language of" the statute. *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); see *id.* at 286 (declining to "read into" the statute a policy favorable to veterans when the text and interplay of the statutory sections would not bear that interpretation). Whatever role the canon might play in resolving ambiguities at the margin, it could not justify construing Section 3.156(c) in a manner that is inconsistent with its text and purpose.

c. Petitioner's argument also depends on the premise that the pro-veteran canon applies to ambiguous VA regulations as well as to ambiguous statutory provisions. That premise is not free from doubt, and it was not discussed below. And even with respect to the interpretation of ambiguous statutes, this Court's recent decisions may call the pro-veteran canon into question. Cf. *Encino Motorcars, LLC* v. *Navarro*, 138 S. Ct. 1134, 1142 (2018) (rejecting canon that exceptions to the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, should be read narrowly). For those reasons as well, the second question presented in the petition for a writ of certiorari does not warrant this Court's review at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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